INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Reasons for granting the writ	4
Conclusion	15
Appendix A	17
Appendix B	26

CITATIONS

Cases:

Cahill v. *New York, N.H. & H. R. Co.*, 351 U.S. 183 — 14

Dakota County v. *Glidden*, 113 U.S. 222 — 14

Dudley v. *Commissioner*, 258 F. 2d 182 — 4

Jennings v. *United States*, 168 F. Supp. 781, vacating opinion, 155 F. Supp. 571 — 5

Laguana v. *Ansell*, 102 F. Supp. 919, affirmed *per curiam*, 212 F. 2d 207, certiorari denied, 348 U.S. 830 — 5

United States v. *Hougham*, 364 U.S. 310 — 14

Statutes:

Foreign Investors Tax Act of 1966, P.L. 89-809, 80 Stat. 1539 — 7, 26

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 11 — 6, 7, 8, 10, 26

Sec. 243 — 4

Sec. 245 — 4

Sec. 301 — 4

Sec. 367 — 4

Sec. 871 — 11, 12

Sec. 881 — 3, 6, 7, 8, 13, 26

Statutes—Continued

Internal Revenue Code of 1954—Continued — Page
Sec. 882 — 6, 7, 27
Sec. 902 — 4
Sec. 932 — 7, 13
Sec. 951–965 — 4
Sec. 1246–1248 — 4
Sec. 1442 — 3, 7, 27
Sec. 1461 — 3, 7
Sec. 1462 — 3, 7
Sec. 1504 — 4
Sec. 7405 — 14
Sec. 7701 — 7, 8, 27
Naval Service Appropriations Act of July 12, 1921, c. 44, 42 Stat. 122, § 1 (48 U.S.C. 1397) — 4
Organic Act of Guam, § 31 (48 U.S.C., 1952 and 1964 eds., § 1421) — 3, 5, 8, 14, 28
Administrative Code of New York City, Title R, City Business Tax, §§ R. 46–3.0, R. 46–4.0, R. 46–20.0, as enacted by L.L. 21, Laws 1966 (CCH New York Tax Reporter, ¶¶ 193–306a, 193–307b, 193–346a) — 10
Tax Law, 59 McKinney's Consolidated Laws of New York, Annotated, c. 60, §§ 208–210 — 10

Miscellaneous:

4 CCH Standard Federal Tax Reporter (1967), ¶ 4206.05 — 10
I.T. 2946, XIV–2 Cum. Bull. 109 (1935) — 4
I.T. 3690, 1944 Cum. Bull. 164 — 4
I.T. 4046, 1951–1 Cum. Bull. 57 — 5
Rev. Rul. 56, 1953–1 Cum Bull. 303 — 13
Rev. Rul. 56–616, 1956–2 Cum. Bull. 589 — 7, 10
Treasury Regulations on Income Tax:
Sec. 1.901–2 — 7
Sec. 1.931–1 — 7
Sec. 1.932–1 — 11
Sec. 1.957–3 — 7

In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

GOVERNMENT OF GUAM, PETITIONER

v.

ATKINS-KROLL (GUAM) LTD., A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Government of Guam, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum of law and judgment of the distict court (Appendix A, *infra,* p. 17) are not officially reported. The opinion of the court of appeals (Appendix A, *infra,* p. 19) is reported at 367 F. 2d 127.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1966 (Appendix A, *infra,* p. 25). On December 22, 1966, Mr. Justice Brennan extended

the time for filing a petition for a writ of certiorari to and including February 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Guam Territorial income tax law imposes a tax of 30 percent on dividends, interest, salaries, and other types of income paid by a Guamanian corporation to a "foreign corporation." The question presented is whether a corporation incorporated in the United States is "foreign" and thus subject to this tax.

STATUTES INVOLVED

The pertinent provisions of the Organic Act of Guam and the Internal Revenue Code of 1954 are printed in Appendix B, *infra*, pp. 26–31.

STATEMENT

Atkins-Kroll (Guam), Ltd. ("A.K. Guam") is a Guam corporation doing business in Guam. All of its capital stock (except qualifying shares) is owned by a California corporation, Atkins, Kroll and Company, Ltd. ("A.K. California"), which is not engaged in business in Guam. In 1958, A.K. Guam declared and paid to its parent, A.K. California, a cash dividend of $25,000. The Guam Territorial income tax law—which is patterned on the United States Internal Revenue Code—imposes a tax on a foreign corporation not engaged in business in Guam which receives dividends, interest, wages, etc., from a domestic corporation. The tax is 30 percent of the gross amount of the dividends, interest, wages, etc. and, because of the difficulty of collecting this tax from a foreign

corporation, the statute requires the Guamanian payor to withhold and remit the tax to the Government of Guam.[1]

Guam asserted that since A.K. Guam, a domestic corporation, had paid a $25,000 dividend to a foreign corporation, A.K. California, in 1958, A.K. California was liable for a tax of $7,500 (30 percent of $25,000); and that A.K. Guam, the payor, was therefore liable for the tax because it was required to withhold and remit to the Government of Guam 30 percent of the dividend paid. A.K. Guam paid the $7,500 tax and instituted this suit for a refund.

The district court held that for purposes of the Guam income tax a California corporation is a "foreign corporation" and thus that the dividends paid by A.K. Guam to A.K. California were paid to a foreign corporation. It therefore denied the claimed tax refund. (App. A, *infra*, pp. 17–19.) The court of appeals reversed, holding that A.K. California is a domestic rather than a foreign corporation for purposes of this provision of the Guam income tax. The court of appeals reasoned that if A.K. California were a foreign corporation subject to the 30 percent tax, Guam would collect more than 50 percent in tax on the same item of income, *i.e.*, it would collect the usual corporate tax of approximately 50 percent from A.K. Guam when it earned the income and another tax of 30 percent from A.K. California when it received A.K. Guam's after-tax earnings as a dividend, a com-

[1] See Organic Act of Guam, § 31; Internal Revenue Code of 1954, §§ 881, 1442, (App. B, *infra*, pp. 26–27); §§ 1461, 1462.

bined tax of approximately 65 percent. (App. A, *infra*, pp. 19–24.)

REASONS FOR GRANTING THE WRIT

The court of appeals held that, for purposes of the tax which the Guam revenue legislation imposes upon dividends, interest, etc. received by "foreign" corporations from Guamanian corporations, an American corporation doing no business in Guam is a "domestic" rather than a "foreign" corporation. The decision is important to the administration of the Guam Territorial income tax since it deprives Guam of the revenue produced by the 30 percent tax on dividends and other payments to United States corporations.[2] In addition, the decision is likely to have an unsettling effect upon the administration of the substantially identical provisions of the Virgin Islands income tax law.[3]

Guam has a mirror income tax, that is, the income tax laws (including the rates of tax) in force in the United States from time to time constitute the income tax laws of Guam and impose a separate tax payable

[2] Moreover, whether a corporation is domestic or foreign is basic to the entire Guam taxing system. This is true not only for the Code sections discussed *infra*, but also for a great variety of other Code provisions. See, *e.g.*, §§ 243(d), 245, 301(b)(1)(C), 367, 902, 951–964, 1246–1248, 1504(b)(3).

[3] The Virgin Islands, like Guam, has a mirror income tax patterned on the United States Internal Revenue Code. Naval Service Appropriations Act of July 12, 1921, c. 44, 42 Stat. 122, 123, § 1 (48 U.S.C., § 1397); see *Dudley* v. *Commissioner*, 258 F. 2d 182 (C.A. 3); I.T. 2946, XIV–2 Cum. Bull. 109 (1935); I.T. 3690, 1944 Cum. Bull. 164.

to the Government of Guam.[4] Congress accomplished this by providing that: "[E]xcept where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Codes of 1954 and 1939, shall be read so as to substitute 'Guam' for 'United States' * * * and with other changes in * * * language, including the omission of inapplicable language, where necessary to effect the intent of this section." Organic Act of Guam, § 31(e) (App. B, *infra*, p. 29).

The decision below violates the basic premise on which Guam's corporate tax law is based, *i.e.*, that Guam and the United States are separate and distinct taxing jurisdictions,[5] so that Guam corporations are "foreign" for purposes of the United States income tax and United States corporations are "foreign" for purposes of the Guam tax.[6] Moreover, the court's reasoning ignores the equally fundamental concept that a corporation and its shareholders are separate taxable entities, so that income may be taxed once when earned by the corporation and again when received by the stockholders. Since appellate review of deci-

[4] Organic Act of Guam, § 31(b), as amended in 1958 (App. B, *infra*, p. 28). Although the 1958 Amendment clarified the Guam law, it is both declaratory of the preexisting law and retroactive. See Organic Act of Guam, § 31(d)(1) (App. B, *infra*, p. 28); *Laguana* v. *Ansell*, 102 F. Supp. 919 (D. Guam) (legislative history of § 31), affirmed *per curiam*, 212 F. 2d 207 (C.A. 9), certiorari denied, 348 U.S. 830; *Jennings* v. *United States*, 168 F. Supp. 781 (Ct. Cl.), vacating opinion, 155 F. Supp. 571; I.T. 4046, 1951-1 Cum. Bull. 57.

[5] Organic Act of Guam, § 31(b) (App. B, *infra*, p. 28) and authorities cited *supra*, fn. 4.

[6] It is clear that for purposes of the United States tax Guam corporations are foreign. See *infra*, p. 7.

sions of the Guamanian taxing authorities may be had only in the Court of Appeals for the Ninth Circuit, there is no possibility of a conflict of decisions developing between the circuits. In view of both the importance of the question and the error of the court of appeals, review by this Court is warranted.

The issue in the present case requires (1) an explanation of the relevant sections of the Internal Revenue Code of 1954 as they operate in the United States and (2) an analysis of the substitutions and changes in the language of the Code that are necessary in order to convert these provisions of United States tax law into the Guam Territorial income tax.

1. Section 11 of the Internal Revenue Code of 1954 imposes a tax of approximately 50 percent on the taxable income of "every corporation."[7] Read literally this section would tax the world-wide net income of "every corporation," domestic or foreign, regardless of whether it had any contact with the United States. Domestic corporations are, in fact, taxed by the United States on their world-wide net income. However, §§881 and 882 provide special treatment for "foreign corporations." Section 881 exempts from the general §11 tax all foreign corporations not engaged in business in the United States and imposes upon them instead a tax of 30 percent of certain gross income (such as dividends and interest) received by them from United States sources. This tax is to be withheld and remitted to the federal government by

[7] The tax has varied in recent years around the 50 percent level, and for purposes of this petition we will use the figure 50 percent.

the United States payor of the income. 1954 Code §§1442, 1461, 1462. Section 882 provides that foreign corporations engaged in business in the United States are taxable under §11, but only on their net income from sources within the United States.[8]

Thus it is important to determine whether a corporation is "domestic" or "foreign," since a domestic corporation pays a tax of approximately 50 percent upon its world-wide net income, a foreign corporation engaged in business in the United States pays a tax of approximately 50 percent on its United States source net income, and a foreign corporation not engaged in business in the United States pays a tax of 30 percent on certain types of its United States source gross income (including dividends received from a United States corporation). A domestic corporation is one "created or organized in the United States or under the law of the United States or of any State or Territory"; all other corporations are foreign. 1954 Code § 7701(a)(4), (5). For this purpose, only Alaska and Hawaii were, before they attained Statehood, considered Territories; Guam is considered a possession,[9] and its corporations are thus foreign, for purposes of the United States income tax.[10]

2(a). We now show how the relevant provisions of the 1954 Code should be converted into the Guam Ter-

[8] The Foreign Investors Tax Act of 1966, P.L. 89-809, Section 104, 80 Stat. 1539, 1555-1557, altered the language of 1954 Code §§ 11, 881 and 882 in some respects without significantly altering the basic issue presented here. See App. B, fns. 1, 2, p. 26.

[9] See, *e.g.*, 1954 Code § 932(c); Treas. Reg. §§ 1.901-2(e), 1.931-1(a), 1.957-3(b).

[10] Rev. Rul. 56-616, 1956-2 Cum. Bull. 589.

ritorial income tax by substituting "GUAM" for "United States" and omitting "inapplicable language." Organic Act of Guam § 31(e) (App. B, *infra*, p. 28). Section 881 imposes upon "every foreign corporation not engaged in trade or business within GUAM * * *, in lieu of the [regular corporate] taxes imposed by section 11, a tax of 30 per cent of" the gross dividends, interest, etc., received from domestic corporations.[11] A foreign corporation is one which is not "created or organized in GUAM or under the law of GUAM *or of any State or Territory*" (italics added). 1954 Code § 7701(a)(4), (5).

Since Guam has no States or Territories, we submit that the italicized phrase should be omitted as "inapplicable language." If this is done, the Guam tax will function like the United States tax. Since a Guam corporation is, for purposes of the United States income tax, considered a foreign corporation, a United States corporation should, for purposes of the Guam income tax, be considered a foreign corporation. If a Guam corporation not engaged in business in the United States owns all of the stock of a California corporation, the United States tax authorities will (1) treat the Guam parent as a foreign corporation, (2) collect a 50 per cent income tax on the net earnings of the California corporation under § 11, and (3) then collect a 30 per cent tax on the gross dividends from the domestic to the foreign (Guam) corporation under § 881, for a combined tax of approximately 65 per cent. Guam should be able

[11] The word "GUAM" indicates substitution in place of the words "United States."

to collect the same amount of tax where, as here, one of its domestic corporations pays dividends to a foreign (California) corporation.[12]

(b). The court of appeals, however, reasoned that Congress could not have intended Guam to collect more than 50 percent in total tax. It therefore held that the words "of any State" in the phrase "created or organized in GUAM or under the law of GUAM or of any State" were not "inapplicable language" but rather referred to any State of the United States, so that a corporation organized in a State of the United States is a domestic corporation for purposes of the Guam income tax.

The court of appeals reached this result because it could "find nothing to indicate that Congress intended" Guam to collect a cumulative tax of more than 50 percent on the same income (App. A, *infra*, p. 24). However, examination of the basic principles of the Code demonstrates that Congress clearly did intend the United States (or Guam) to collect taxes aggregating more than 50 percent when a corporation earns income and then pays its after-tax earnings to its stockholders as dividends.

[12] Since the rates of taxation of foreign corporations varies depending upon whether the foreign corporation is engaged in business in the United States, unless otherwise stated, when we discuss a Guam corporation which receives dividends from an American corporation, we are using the rates applicable where the Guamanian corporation is not engaged in business in the United States. Similarly, when we discuss an American corporation receiving payments from a Guam corporation, we assume that the former is not engaged in business in Guam.

If, for example, a United States corporation is wholly owned by one or more United States citizens, the domestic corporation pays 50 percent tax on its net income and, when it pays the after-tax earnings to its stockholders as dividends, they pay individual income taxes at rates up to 70 percent. Thus, the combined taxes from the two steps may total as much as 85 percent of the corporation's original earnings.[13]

If, as another example, a United States corporation is wholly owned by a foreign corporation which is not engaged in business in the United States, the domestic corporation pays the usual 50 percent corporate tax under § 11 and, when the domestic corporation pays the after-tax earnings to its foreign parent as a dividend, the parent pays a 30 percent tax under § 881 on the gross dividend. Thus, the combined United States tax on the domestic subsidiary and the foreign parent is approximately 65 percent.[14]

This is equally true where the foreign parent is a Guamanian corporation, since for purposes of the United States income tax Guam corporations are foreign corporations. Rev. Rul. 56–616, 1956–2 Cum. Bull. 589. Thus, if the facts of the instant case were

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[13] And State and local taxes may take an additional amount. The New York City and State corporate taxes, for example, amount to almost 11 percent of net income. Administrative Code of New York City, Title R, City Business Tax, §§ R. 46–3.0, R. 46–4.0, R. 46–20.0, as enacted by L.L. 21, Laws 1966 (CCH New York Tax Reporter, ¶¶ 193–306a, 193–307b, 193–346a) (5½ percent tax); Tax Law, 59 McKinney's Consolidated Laws of New York Annotated, c. 60, §§ 208–210 (5½ percent tax). The Guam tax here in question is comparable to both the federal and the local income taxes in this country.

[14] Tax treaties with approximately 25 foreign countries, mostly in Western Europe, have reduced the 30 percent tax to 15 percent or, in some cases, to 5 percent. 4CCH Standard Federal Tax Reporter (1967), ¶ 4206.05.

reversed, so that A.K. Guam was the parent corporation and A.K. California the wholly owned subsidiary, the United States would collect a combined tax of 65 percent on United States earnings paid as dividends to the Guamanian parent.

Moreover, this would also be true if the United States corporation was owned by one or more Guamanian citizens. The United States corporation would pay the usual 50 percent tax on its earnings and the Guamanian stockholders would be subject to the United States tax of 30 percent of the gross dividends paid to them by the United States corporation. 1954 Code § 871; Treas. Reg. § 1.932–1(a)(1). The combined tax paid by the United States corporation and its individual Guamanian stockholders would be 65 percent.

Thus it is clear that the scheme of the Code is generally to collect at least two taxes on corporate income—once when the income is earned by the corporation and once when it is paid to its stockholder or stockholders as a dividend, and it is not at all unusual for the combined tax to reach 65 percent. The fact that the stockholders are *foreign* corporations or citizens affects only the rate of tax imposed at the stockholder level (*i.e.*, whether a graduated tax on net income or a flat 30 percent tax on gross income) and the method of collection (*i.e.*, whether the tax is collected from the stockholder or withheld by the payor corporation), but not whether they are taxed.

(c). In applying the Internal Revenue Code to Guam, Congress adopted the same scheme of taxing corporate earnings once when earned and once when distributed. If a Guam corporation is owned by one or more Guam-

anian citizens, Guam collects two taxes which, depending on the individual shareholders' tax brackets, might total as much as 85 percent. However, if the same Guam corporation is owned by one or more United States corporations, the Ninth Circuit's decision apparently allows Guam to collect only one tax (*i.e.*, on the Guam corporation's earnings) and exempts the recipients of the dividends from Guam tax. Thus, Guam collects more tax when a Guam corporation is owned by Guamanians than when it is owned by a United States corporation or corporations.

As pointed out *supra*, if a Guam corporation has a United States subsidiary, the United States collects two taxes—one from the parent and one from the subsidiary—aggregating 65 percent. However, if a Guamanian subsidiary is owned by a United States corporation, the Ninth Circuit's decision results in Guam collecting only one tax of 50 percent. We submit that such a construction clearly violates Congress' clear intent to give Guam a separate, mirror income tax act that would operate within Guam in the same way that the Internal Revenue Code operates within the United States.

Moreover, notwithstanding the Ninth Circuit's decision, if a Guam corporation is owned by one or more individual United States citizens, Guam apparently collects two taxes aggregating 65 percent; it collects the usual 50 percent tax on the domestic corporation's earnings and then a 30 percent tax under § 871 when the corporate earnings are distributed as dividends to nonresident alien individuals (*i.e.*, United States

citizens resident in the United States).[15] Therefore, if a Guamanian corporation is wholly owned by a United States corporation, Guam collects only 50 percent tax under the instant decision, but if the Guam corporation is owned by a United States individual, Guam collects a combined tax of 65 percent. Moreover, if the stock of a Guam corporation were owned one-half by a United States corporation and one-half by an individual United States citizen, Guam would collect a combined tax of 50 percent on the corporate earnings distributed as dividends to the United States corporation and a combined tax of 65 percent on the corporate earnings distributed as dividends to the United States individual.

Finally, the logical consequence of the Ninth Circuit's decision is to preclude Guam from collecting any tax at all on interest, royalties, salaries, and most other payments by its corporations and citizens to United States corporations not engaged in business in Guam. The Ninth Circuit purported to restrict its holding that United States corporations are domestic for purposes of the Guam income tax to § 881. If this means that for other Code sections United States corporations are foreign, Guam apparently collects no tax at all on interest, royalties, salaries and most other forms of income paid to United States corporations by Guam corporations or citizens. Assume, for example, that a Guam corporation which has bor-

[15] Presumably a United States citizen resident in the United States would be a nonresident alien so far as Guam is concerned. A citizen of Guam resident in Guam is considered a nonresident alien so far as the United States is concerned. 1954 Code § 932; Rev. Rul. 56, 1953–1 Cum. Bull. 303.

rowed substantial amounts from a United States bank earns $100,000 before the payment of interest on the loan, and that the Guam corporation pays $100,000 of interest to the United States bank. The Guam corporation's taxable income would then be zero and it would owe no corporate tax to Guam. Moreover, under this interpretation of the instant decision, the United States bank, which has earned $100,000 from Guam sources, would apparently owe no tax to Guam. Thus, for all payments that are deductible to the payor—such as interest, royalties, salaries, and generally everything other than dividends—the instant decision does not merely reduce the Guam tax to 50 percent; instead, it apparently bars the collection of any Guam tax.

In short, the instant decision will create serious anomalies and complications in the administration of the Guam Territorial income tax and deprive Guam of significant revenue which the scheme of both the Internal Revenue Code and § 31 of the Organic Act of Guam indicate Congress intended it to have.[16]

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[16] In response to the court of appeals mandate and erroneously believing that the time for filing a petition for certiorari had expired, the Guam tax authorities have refunded the tax, with interest and costs. The refund was not made in settlement of the judgment below and the controversy between the parties is not moot. See *Dakota County* v. *Glidden*, 113 U.S. 222, 224; *Cahill* v. *New York, N.H. & H. R. Co.*, 351 U.S. 183; *United States* v. *Hougham*, 364 U.S. 310. If this Court grants the petition and ultimately reverses, Guam will take appropriate action to recover the tax erroneously refunded. 1954 Code § 7405(b); § 31(h)(4), Organic Act of Guam (48 U.S.C. 1421i (h)(4)) (authorizing Guam to bring suits for the recovery of erroneous tax refunds).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1967.

247-737—67——3

APPENDIX A

District Court of Guam, Territory of Guam

Civil Case No. 54–64

ATKINS, KROLL (GUAM), LTD., A CORPORATION, PLAINTIFF

v.

GOVERNMENT OF GUAM, DEFENDENT

(Filed, District Court of Guam, Agana, Guam, November 30, 1964)

MEMORANDUM OF LAW AND JUDGMENT

The plaintiff, Atkins, Kroll (Guam), Ltd., is a corporation organized and existing under the laws of Guam. All of its stock, except qualifying shares, is owned by Atkins, Kroll and Company, Ltd., a corporation organized and existing under the laws of California with its principal office in San Francisco. In 1958 the plaintiff paid a dividend in the amount of $25,000 to the parent corporaton and the defendant, government of Guam, required the payment of thirty percent of such dividend, or $7500, as an income tax on dividends paid to a foreign corporation. The plaintiff paid such sum and now seeks its recovery. The Court has jurisdiction under the Organic Act of Guam, as amended, 48 U.S.C.A. 1421i(h)(1).

The parties stipulated at pre-trial that the question presented should be determined by the Court on the basis of briefs, but in its reply brief the defendant introduced factual and extraneous material. The

plaintiff moved to strike but the Court denied the motion upon the basis that the Court did not consider that such factual allegations affected in any way the basic issue involved and would not be considered by the Court. The plaintiff informed the Court that no further brief would be filed by the plaintiff.

The basic question is whether dividends paid by a Guam corporation to a California corporation, not doing business in Guam, are subject to the thirty percent withholding, at source, on the same basis as those paid by a California corporation to a Guam corporation.

The Guam income tax is a territorial tax measured by the United States income tax, Laguana v. Ansell, 102 F. Supp. 919, affirmed 212 F. 2d 207, cer. den. 75 S. Ct. 51, 348 U.S. 830, 99 L. Ed. 654. The tax in dispute here is governed by Sections 1441 and 1442, Internal Revenue Code 1954. It was held, Rev. Rule 56–616, that income items specified in section 1441(b) of such Code, payable to a Guamanian corporation not engaged in trade or business within the United States, are subject to the withholding tax provision of section 1442 of the Code. Even before the clarifying amendment to the Organic Act of Guam, Act of Aug. 20, 1958, Sec. 1, 72 Stat. 681, 48 U.S.C.A. 1421i, the courts recognized that in applying the Guam income tax it was necessary to adopt the so-called "mirror reading" principle. The law now reads

> (e) In applying as the Guam Territorial income tax the income tax laws in force in Guam pursuant to subsection (a) of this section, except where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Code of 1954 and 1939, shall be read so as to substitute 'Guam' for 'United States', 'Governor or his delegate' for 'Secretary or his delegate', 'Governor or his delegate'

> for 'Commissioner of Internal Revenue' and 'Collector of Internal Revenue,' 'District Court of Guam' for 'district court' and with other changes in nomenclature and other language, including the omission of inapplicable language, where necessary to effect the intent of this section.

Under this reading a Guam corporation becomes a domestic corporation and a California corporation becomes a foreign corporation for Guam income tax purposes. It follows that the defendant properly required the payment of the thirty percent tax, or $7500, and judgment is herewith entered for the defendant.

Dated at Agana, Guam, this 30th day of November, A. D. 1964.

(s) Paul D. Shriver,
PAUL D. SHRIVER, *Judge.*

United States Court of Appeals, Ninth Circuit

September 30, 1966

No. 19915.

ATKINS-KROLL (GUAM) LTD., A CORPORATION
APPELLANT

v.

GOVERNMENT OF GUAM, APPELLEE

Before HAMLEY, JERTBERG and ELY, *Circuit Judges.*

JERTBERG, *Circuit Judge:* Appellant, Atkins-Kroll (Guam, Ltd., hereinafter Kroll (Guam, is a corporation organized and existing under the laws of the Territory of Guam. All of its capital stock, except for qualifying shares, is owned by Atkins, Kroll and Company, Ltd., hereinafter Atkins Kroll, which is a corporation organized and existing under the laws of

the State of California, with its principal place of business at San Francisco. It is not engaged in trade or business in Guam.

The appeal involves a claim for refund by Kroll (Guam) with respect to the withholding tax on dividends paid by it to Atkins Kroll.

The facts upon which the District Court denied the claim for refund are entirely stipulated. The pre-trial order entered in that court states:

> No question of fact is presented and the parties have stipulated that the question involved shall be determined by the court as a question of law.

The stipulated facts are: In 1958, Kroll (Guam) declared and paid to Atkins Kroll a cash dividend of $25,000. The Government of Guam asserted that Kroll (Guam) was required by the Guam Revenue Laws, Sections 881 and 1442, to withhold 30 per cent of the sum paid as a dividend on the ground that Atkins Kroll was a foreign corporation not engaged in trade or business in Guam and assessed the sum of $7,500. Kroll (Guam) paid said sum to appellee and filed a claim for refund of such payment. Appellee took no formal action on the claim, whereupon Kroll (Guam) instituted this action in the District Court for refund of the $7,500, plus interest.

The District Court held that appellee properly required the payment of the tax of $7,500 and entered judgment denying a refund to Kroll (Guam).

Section 31 of the Organic Act of Guam, 64 Stat. 392 (1950), as amended in 1958, 72 Stat. 681 (1958), in parts here relevant [48 U.S.C. 1421i (a), (b), (d), and (e)], provides:

> SECTION 1421i. INCOME TAX.
>
> (a) Applicability of Federal laws. The income-tax laws in force in the United States

of America and those which hereafter may be enacted shall be held to be likewise in force in Guam.

(b) The income-tax laws in force in Guam pursuant to subsection (a) shall be deemed to impose a separate Territorial income tax, payable to the Government of Guam, which tax is designated the "Guam Territorial income tax."

(d) The income-tax laws in force in Guam include, but are not limited to the following provisions of the Internal Revenue Code of 1954, where not manifestly inapplicable or incompatible with the intent of this section: Subtitle A (not including Chapter 2 and section 931).[1]

(e) Substitution of terms. In applying as the Guam Territorial income-tax the income tax laws in force in Guam, except where otherwise manifestly required, the applicable provisions of the Internal Revenue Codes of 1954 and 1939, shall be read so as to substitute "Guam" for "United States" and with other changes in nomenclature and other language, including the omissions of inapplicable language where necessary to effect the intent of this section.

Section 881 of the Internal Revenue Code of 1954 imposes on a foreign corporation not engaged in trade or business in the United States a tax of 30 per cent of the amount received from sources within the United States as dividends. As a means of collecting the tax, Section 1442 of the Internal Revenue Code of 1954 requires a corporation which pays a dividend to a foreign corporation not engaged in trade or business in the United States to withhold and pay over an amount equal to 30 percent of the dividends. The amount so withheld and paid over

[1] Subtitle A pertains to income taxes.

is allowed as a credit against a tax imposed by Section 881 as provided by Section 1462 of the Internal Revenue Code of 1954.

Under the heading "Definitions", Section 7701 of the Internal Revenue Code of 1954 provides in pertinent part:

> (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—
>
> (4) DOMESTIC. The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State or Territory.
>
> (5) FOREIGN. The term "foreign" when applied to a corporation or partnership means a corporation or partnership which is not domestic.
>
> (9) UNITED STATES. The term "United States" when used in a geographical sense includes only the States and the District of Columbia.
>
> (10) STATE. The term "State" shall be construed to include the District of Columbia, where such construction is necessary to carry out provisions of this title.

By substituting "Guam" for "United States", as directed in subsection (e) of Section 1421i of the Organic Act of Guam, such sections in pertinent parts read as follows:

> SECTION 881. In the case of every foreign corporation not engaged in trade or business within Guam, there is hereby imposed for each taxable year a tax of 30 per cent of the amount received from sources within Guam as dividends.
>
> SECTION 1442. In the case of a foreign corporation subject to taxation under this subtitle not engaged in trade or business within Guam, there shall be deducted and withheld at the source in the same manner and on the same

> items of income as provided in Section 1441 or Section 1451 a tax equal to 30 per cent thereof, and the deduction and withholding shall be at the rate specified therein.

The problem of substitution arises in connection with Section 7701 of the Internal Revenue Code of 1954. It is appellee's position that "Guam" should be substituted for "United States" in the definition of "Domestic" in each of the two places where "United States" is used in subsection (a)(4) of 7701. Appellee would recast subsection (a)(4) of 7701 to read as follows:

> "(4) DOMESTIC. The term 'domestic' when applied to a corporation or partnership means created or organized in Guam or under the law of Guam."

Appellee would thus excise from the definition the phrase "or of any State or Territory" as being inapplicable language.

It is appellant's position that "Guam" should be substituted for "United States" in only the first place where it appears in the definition.

In our view we see no reason why the last phrase in the definition "or of any State or Territory" should be disregarded and under such view it makes no difference whether "Guam" is substituted for "United States" in one or both places where "United States" appears in the definition since the phrase "or of any State or Terriitory" preserves Atkins Kroll as a domestic corporation since it was organized in a state of the United States, to-wit, the State of California. In holding that the phrase "or of any State or Territory" preserves a California corporation as a domestic corporation, even assuming that "Guam" should be substituted for "United States" in both places in the definition, we do so only for the purposes of Section 881, as it may well be that for the purposes of other

provisions of the Guam income tax laws, the words "or of any State or Territory" would have to be disregarded pursuant to the statutory authority conveyed by the words "except where it is manifestly otherwise required." A reason for not following the latter course with respect to Section 881 lies in the fact that with respect to that section, unless the words "or of any State or Territory" are given full application, a manifest and substantial inequity results, for otherwise the combined Guam and Federal tax burden on the income which a California corporation ultimately receives from the business of its Guam subsidiary substantially exceeds the applicable corporate income tax rate under either the laws of Guam or the United States. We find nothing to indicate that Congress intended the Guam tax laws to be interpreted so as to reach such a result.

The District Court erred in concluding that Atkins Kroll is a foreign corporation under Guam tax laws.

We deem it unnecessary to reach other contentions appearing in the briefs.

The judgment of the District Court is reversed.

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,915

ATKINS-KROLL (GUAM) LTD., A CORPORATION, APPELLANT

v.

GOVERNMENT OF GUAM, APPELLEE

APPEAL from the United States District Court for the District of Guam.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Guam and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, with costs in this Court in favor of the appelland and against the appellee.

Costs:

Docket Fee	$25.00
Printing record	104.57
Total	129.57

Filed and entered September 30, 1966.

APPENDIX B

Internal Revenue Code of 1954 (26 U.S.C.):[1]

SEC. 11. TAX IMPOSED.

(a) *Corporations In General.*—A tax is hereby imposed for each taxable year on the taxable income of every corporation.

* * * * *

(d) *Exceptions.*—Subsection (a) shall not apply to a corporation subject to a tax imposed by—

* * * * *

(4) section 881(a) (relating to foreign corporations not engaged in business in United States).[2]

SEC. 881. TAX ON FOREIGN CORPORATIONS NOT ENGAGED IN BUSINESS IN UNITED STATES.

(a) *Imposition of Tax.*—In the case of every foreign corporation not engaged in trade or business within the United States, there is hereby imposed for each taxable year, in lieu of the taxes imposed by section 11, a tax of 30 percent of the amount received from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other

[1] The Foreign Investors Tax Act of 1966, P.L. 89-809, 80 Stat. 1539, altered in some respects the language of most of the sections quoted herein, but, except as otherwise stated herein, the changes are not substantial for purposes of the instant case.

[2] The Foreign Investors Tax Act of 1966, *supra* (Section 104(b)(2)(B)), renumbered and amended § 11(d)(4) to read as follows:

SEC. 11(f) *Foreign Corporations.*—In the case of a foreign corporation, the tax imposed by subsection (a) shall apply only as provided by section 882.

fixed or determinable annual or periodical gains, profits, and income (including amounts described in section 631 (b) and (c) which are considered to be gains from the sale or exchange of capital assets).

* * * * *

SEC. 882. TAX ON RESIDENT FOREIGN CORPORATIONS.

(a) *Imposition of Tax.*—A foreign corporation engaged in trade or business within the United States shall be taxable as provided in section 11.

(b) *Gross Income.*—In the case of a foreign corporation, gross income includes only the gross income from sources within the United States.

SEC. 1442. WITHHOLDING OF TAX ON FOREIGN CORPORATIONS.

In the case of foreign corporations subject to taxation under this subtitle not engaged in trade or business within the United States, there shall be deducted and withheld at the source in the same manner and on the same items of income as is provided in section 1441 or section 1451 a tax equal to 30 percent thereof; except that, in the case of interest described in section 1451 (relating to tax-free covenant bonds), the deduction and withholding shall be at the rate specified therein.

SEC. 7701. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(4) *Domestic.*—The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State or Territory.

(5) *Foreign.*—The term "foreign" when applied to a corporation or partnership means a corporation or partnership which is not domestic.

* * * * *

Organic Act of Guam, c. 512, 64 Stat. 384:

Sec. 31. The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

[48 U.S.C. 1952 ed., Sec. 1421i.]

Sec. 31 [as amended by Sec. 1, Act of August 20, 1958, P.L. 85–688, 72 Stat. 681].

(a) The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

(b) The income-tax laws in force in Guam pursuant to subsection. (a) of this section shall be deemed to impose a separate Territorial income tax, payable to the government of Guam, which tax is designated the "Guam Territorial income tax".

(c) The administration and enforcement of the Guam Territorial income tax shall be performed by or under the supervision of the Governor. Any function needful to the administration and enforcement of the income-tax laws in force in Guam pursuant to subsection (a) of this section shall be performed by any officer or employee of the government of Guam duly authorized by the Governor (either directly, or indirectly by one or more redelegations of authority) to perform such function.

(d) (1) The income-tax laws in force in Guam pursuant to subsection (a) of this section include but are not limited to the following provisions of the Internal Revenue Code of 1954, where not manifestly inapplicable or incompatible with the intent

of this section: Subtitle A (not including chapter 2 and section 931); chapters 24 and 25 of subtitle C, with reference to the collection of income tax at source on wages; and all provisions of subtitle F which apply to the income tax, including provisions as to crimes, other offenses, and forfeitures contained in chapter 75. For the period after 1950 and prior to the effective date of the repeal of any provision of the Internal Revenue Code of 1939 which corresponds to one or more of those provisions of the Internal Revenue Code of 1954 which are included in the income-tax laws in force in Guam pursuant to subsection (a) of this section, such income-tax laws include but are not limited to such provisions of the Internal Revenue Code of 1939.

(2) The Governor or his delegate shall have the same administrative and enforcement powers and remedies with regard to the Guam Territorial income tax as the Secretary of the Treasury, and other United States officials of the executive branch, have with respect to the United States income tax. Needful rules and regulations for enforcement of the Guam Territorial income tax shall be prescribed by the Governor. The Governor or his delegate shall have the authority to issue, from time to time, in whole or in part, the text of the income-tax laws in force in Guam pursuant to subsection (a) of this section.

(e) In applying as the Guam Territorial income tax the income-tax laws in force in Guam pursuant to subsection (a) of this section, except where it is manifestly otherwise required, the applicable provisions of of the Internal Revenue Codes of 1954 and 1939, shall be read so as to substitute "Guam" for "United States", "Governor or his delegate" for "Secretary or his dele-

gate", "Governor or his delegate" for "Commissioner of Internal Revenue" and "Collector of Internal Revenue", "District Court of Guam" for "district court" and with other changes in nomenclature and other language, including the omission of inapplicable language, where necessary to effect the intent of this section.

* * * * *

(h) (1) Notwithstanding any provision of section 22 of this Act or any other provision of law to the contrary, the District Court of Guam shall have exclusive original jurisdiction over all judicial proceedings in Guam, both criminal and civil, regardless of the degree of the offense or of the amount involved, with respect to the Guam Territorial income tax.

(2) Suits for the recovery of any Guam Territorial income tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, under the income-tax laws in force in Guam, pursuant to subsection (a) of this section, may, regardless of the amount of claim, be maintained against the government of Guam subject to the same statutory requirements as are applicable to suits for the recovery of such amounts maintained against the United States in the United States district courts with respect to the United States income tax. When any judgment against the government of Guam under this paragraph has become final, the Governor shall order the payment of such judgments out of any unencumbered funds in the treasury of Guam.

* * * * *

(4) A civil action for the collection of the Guam Territorial income tax, together with fines, penalties, and forfeitures, or for the recovery of any erroneous refund of such tax, may be brought in the name of and by the government of Guam in the District Court of Guam or in any district court of the United States or in any court having the jurisdiction of a district court of the United States.

[48 U.S.C., Sec. 1421i]

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No. 1100

In the Supreme Court of the United States

OCTOBER TERM, 1966

GOVERNMENT OF GUAM,
Petitioner,

vs.

ATKINS-KROLL (GUAM), LTD.,
a corporation
Respondent.

Brief of Respondent Atkins-Kroll (Guam), Ltd. in Opposition to Petition for Writ of Certiorari

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Questions Presented	1
Statement of Case	1
Argument	1
Importance of Question	3
Correctness of the Decision of the Court of Appeals	4
Effect of Payment of Refund	8
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases	Pages
Dakota County v. Glidden, 113 U.S. 222 (1885)	9
Thorp v. Bonnifield, 177 U.S. 15 (1900)	9
United States v. Hougham, 364 U.S. 310 (1960)	9

Statutes

Internal Revenue Code of 1954 (26 U.S.C.): Section 901-Section 905	5
Naval Service Appropriations Act of July 12, 1921, c. 44, 42 Stat. 122, 123, § 1 (48 U.S.C., 1397)	3
Organic Act of Guam, § 31 (48 U.S.C., 1952 and 1964 eds., § 1421)	2, 3, 6

Miscellaneous

96 Congressional Record, May 23, 1950, page 7577	7
Senate Report No. 2109, 81st Cong. 2nd Sess., page 4, 1950	8

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OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED, QUESTIONS PRESENTED AND STATEMENT OF CASE

These matters are omitted pursuant to Rule 40(3). References herein are made to the Petition ("Pet.") or its appendix ("Pet. App.") followed by the page number.

ARGUMENT

Petitioner states two reasons for granting the writ: the importance of the question and the error of the Court of Appeals. Pet. 6. We shall discuss separately below these two points and also the effect of the recent payment by

Petitioner of the entire amount in controversy in this case. Pet. 14.

We point out first, however, that the question presented is entirely a matter of statutory interpretation and relates solely to the law of Guam. It does not affect the tax laws of the Virgin Islands nor, more importantly, the tax laws of the federal government. The Court of Appeals very specifically, as noted by Petitioner (Pet. 8), limited its decision to the issue before it. Thus Petitioner's concern about various hypothetical problems (Pet. 8-14) is not relevant because such problems are not factually involved in this case and are in no respect dealt with by the holding or opinion of the Court of Appeals. Indeed, such factual situations may be non-existent; only a small number of United States taxpayers might be expected to have any connection with Guam in view of its geographical location and size, its relatively small population, and the limited commercial activity taking place there.

Petitioner's hypothetical problems are based upon what Petitioner considers to be logical extensions of the decision of the Court of Appeals. However, the Court of Appeals on the facts before it found that the statutory interpretation urged by Petitioner would result in "a manifest and substantial inequity" (Pet. App. 23) and that a contrary interpretation was therefore required by Section 1421i(e) of the Organic Act of Guam (Pet. App. 28). As will be shown, Section 1421i(e) recognizes that a rigid application of the general provisions of the Organic Act may result in an inequity, and expressly frees a court in such an instance from any requirement of mechanical consistency in interpretation. The Court of Appeals found this to be such a case and properly proceeded to exercise its power and duty as contemplated by the Organic Act.

1. Importance of Question

Petitioner states that the decision of the Court of Appeals is important because it deprives the Government of Guam of revenue. Pet. 4. This alone has little bearing upon the importance of the issue since the same is true of any tax refund suit. The petition is totally silent as to the amount of revenue involved. The tax of $7500 in controversy here would not alone seem to have any serious effect on the revenue of Guam. There is no indication by Petitioner of how many other taxpayers, if any, might be relieved of Guam tax by the decision of the Court of Appeals in this case, nor what the amount of such taxes might be. The absence of any such representation by Petitioner suggests either that Petitioner has never had occasion to collect a similar tax or that it has had occasion to do so in the past but has not attempted to collect such a tax.

Petitioner also refers in vague terms to the possibility that the decision of the Court of Appeals might have "an unsettling effect" upon the administration of the Virgin Islands income tax law. Pet. 4. However, the similarity of the Virgin Islands income tax law to that of Guam does not extend to the specific provisions of the Organic Act of Guam involved here. Neither the Naval Service Appropriations Act of July 12, 1921, c. 44, 42 Stat. 122, 123, § 1 (48 U.S.C., § 1397) nor any other statutory provision referred to by Petitioner contains language comparable to the provisions of Section 1421i(e) of the Organic Act which call for certain substitutions of terms and "other changes in nomenclature and other language, including the omission of inapplicable language when necessary to effect the intent of this section."

Moreover, Petitioner does not assert that any court has held that the Virgin Islands can collect a tax similar to

the Guam tax involved here and, indeed, does not assert that such a tax has ever been demanded or collected at any time during the many years the Virgin Islands tax law has been in effect. It is difficult under these circumstances to perceive what "unsettling effect" there will be on the law of the Virgin Islands.

Petitioner correctly notes that there can be no conflict between the Courts of Appeal as to the question of Guam law (Pet. 6), but does not state an equally important point, which is that even if the Virgin Islands law were in this respect comparable to Guam law (which it is not), there would be no conflict because Petitioner refers to no other case under either law involving the issue presented here.

2. Correctness of the Decision of the Court of Appeals

Petitioner's argument that the decision in this case was wrong is based upon the effect the decision may assertedly have on other taxpayers in other situations. There is no showing that such taxpayers or situations exist, and Petitioner ignores the correctness and fairness of the decision as to the taxpayer in this particular case, which is the only matter decided by the Court of Appeals.

The interpretation of the Organic Act by the Court of Appeals is based upon its finding that

> "otherwise the combined Guam and Federal tax burden on the income which a California corporation ultimately receives from the busines of its Guam subsidiary substantially exceeds the applicable corporate income tax rate under either the laws of Guam or the United States." Pet.App. 24.

This is the principal point involved in the case, and can be described best by an illustration. A California corporation having a branch office in Guam finds its earnings

from Guam taxed by Guam at 50% (see Pet. 6, footnote 7). The same earnings are taxed at the same rate by the federal government, but the latter tax is exactly offset by the credit allowed for federal purposes. Internal Revenue Code of 1954, § 901-§ 905. However, if a California corporation has a wholly-owned subsidiary Guamanian corporation in Guam, the subsidiary's earnings are taxed at 50% by Guam and the balance upon payment to the parent is assertedly taxed at 30% by Guam and is taxed at 50% by the federal government. Because of the limitation upon the credit provisions of the federal law referred to above, the net result is that earnings from Guam are taxed at approximately 65%.

The question before the Court of Appeals was whether the Organic Act of Guam required this result and, if not, whether Congress had intended the Act to be so interpreted.

Petitioner's interpretation is plainly not required by the Organic Act. On the contrary, it is difficult to imagine statutory language less appropriate than Section 1421i(e) to the argument that a particular interpretation is required by the statute. Instead, the statutory provisions themselves call for changes and interpretation "where necessary to effect the intent of this section." Pet.App. 30.

That Congress did not intend Petitioner's interpretation is equally clear but calls for further comment.

First, there is no doubt that the Guam tax law is separate from the federal tax law, but the two are not so separate as Petitioner suggests and are not as separate as the federal tax law and the tax law of a European country. The petition is thus beside the point in stating that an effective tax rate in excess of 50% may apply to the combined earnings of a domestic subsidiary and a foreign (e.g., European) parent. Pet. 10. Congress has no

legislative power as to the foreign tax liability in such a case, whereas in the present case Congress is the legislature which enacted both pertinent taxing statutes. Whether it intended that the same dividends be taxed twice and that the effective tax rate be 65% is therefore pertinent to interpreting the Organic Act of Guam in a manner not involved in the comparison to European taxes.

Moreover, even in the case of a European corporation the harshness of the 30% withholding tax has been recognized and ameliorated by treaties, as noted by Petitioner. Pet. 14. If such a policy is appropriate between the United States and a foreign country it would seem even more appropriate between the United States and one of its territories. A tax treaty between the United States and Guam is not possible, but the same result is made possible by a statutory provision permitting the result reached in this case by the Court of Appeals.

Petitioner's reference to the fact that two separate taxes are generally borne by a corporation and its shareholders under federal law (Pet. 11) is also beside the point, and for similar reasons. What are involved here are not two taxes, but three. To say that Congress intended that they be applied to produce an effective tax rate of 65% because Congress intended to establish a separate Guam tax system is on its face improbable and is contrary to the history of the Organic Act of Guam.

What Congress intended by the Organic Act was that Guam collect for its own purposes taxes on income that might otherwise be untaxed, or on income that would thereby be taxed by Guam instead of by the federal government. Neither is the case here because the dividends in question not only would be but in fact are taxed also by the federal government.

For example, the following explanations were made when the Organic Act of Guam was being considered by Congress:

"MR. PETERSON. Our colleague the gentleman from Nebraska [MR. MILLER] has made a study of that. The amendment he offered and which we have adopted today will be very helpful in that respect.

MR. MILLER, of Nebraska. There will be no direct payment by the Treasury of this country. The amendment we just adopted in committee provides that the income tax laws in force in the United States of America and which may hereafter be in force will be the law over there. That will be of great help in plugging certain loopholes. The people of Guam and a large number of civilians and workers over there on construction work, as well as military personnel, pay no income tax or have no withholding tax. In fact, they are paid a bonus for working there. This will plug that loophole and bring in some money to the United States Treasury. As I understand it, the salaries of these people will be paid by the Guamanian Government and the average deposit in Guamanian banks of the people of Guam averages about $8,000.00.

MR. SCRIVNER. In other words, I am to understand that there is sufficient property, there are sufficient sources of revenue right there on the island of Guam so that they will be able to set up a tax structure sufficient to carry their own expenses of government without asking for any contribution from the United States to help carry their government cost?

MR. MILLER, of Nebraska. That is my understanding.

MR. PETERSON. That is my understanding also." 96 Cong. Rec. May 23, 1950, at page 7577.

A related goal of Congress in enacting the Organic Act of Guam was to encourage American business enterprise in Guam, rather than to penalize it by discouraging the formation of separate Guamanian subsidiaries by United

States corporations having branches in Guam or by taxing the earnings of existing subsidiaries at 65%. See the following statement in the Senate Report:

> ". . . given a period of peace, the growth of Guam as a transportation and commercial center for American interests in the Far East seems almost a foregone conclusion. American business enterprise in the area will want, and need, a center in which it can have the full protection of American laws and legal procedure." S.Rep. No. 2109 81st Cong., 2nd Sess. p. 4 (1950).

3. Effect of Payment of Refund

As noted by Petitioners, see Pet. 14 note 16 and letter from counsel for Petitioner to the Clerk of this Court dated March 14, 1967, the Guam tax authorities paid the entire amount in controversy here during January, 1967.

The circumstances and intent of the payment are still uncertain. Petitioner states in the above footnote that the "refund was not made in settlement of the judgment below." However, the fact is that the payment was made by the delivery of three checks and a Government of Guam Form C-1-1331, dated January 20, 1967, and stating the reasons for adjustment as follows:

> "To refund overpayment as per Memorandum 12/28/66, from Attorney General to Commissioner."

The payment was thus in no sense conditional on its face, was made pursuant to a Memorandum from co-counsel appearing on the Petition and as stated in the above letter of March 14, 1967, was made with full knowledge that the time within which to submit a petition for a writ of certiorari had not expired.

By letter dated January 30, 1967, Respondent advised the Office of the Solicitor General that Respondent had received payment.

It is by no means clear that payment under these circumstances does not render this case moot. The holding in *Dakota County v. Glidden,* 113 U.S. 222 (1885) is contrary to the dictum cited by Petitioner (Pet. 14); the holding in *United States v. Hougham,* 364 U.S. 310 (1960) is that a respondent could not make the case moot by making payment to a petitioner (rather than vice versa as here); and see *Thorp v. Bonnifield,* 177 U.S. 15 (1900).

Moreover, it is not clear that the problem of mootness is avoided by Section 31(h)(4) of the Organic Act of Guam (48 U.S.C. 1421i(h)(4), Pet.App. 31). If the payment was intended to dispose of the case without seeking review by this Court, then it would seem that the instant proceedings are moot, and that whatever right there may be to recover the refund would require Petitioner to commence a new and separate action in the District Court of Guam, but that in such action either the law of the case would have been established in the instant proceedings or the matter would be res judicata.

Respondent recognizes that there may be inadvertent errors arising from delay and difficulty in communication between Washington, D. C. and Guam. On the other hand, Respondent does not know on the information available to it what motivated the Attorney General of Guam, the Commissioner of Guam or the other authorities to make the payment, and submits that the problem of mootness which has been raised by Petitioner's voluntary payment has not been resolved by Petitioner in its Petition and subsequent letter described above.

CONCLUSION

For the reasons stated, the decision below was correct. It announces no new or important principles of law and creates no conflict with any decisions of this Court or other Circuits. Accordingly, the Petition for Writ of Certiorari should be denied.

Dated at San Francisco, California, March 24, 1967.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1100

GOVERNMENT OF GUAM, PETITIONER

v.

ATKINS-KROLL (GUAM) LTD., A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

In its brief in opposition respondent argues (1) that the decision of the lower court is correct and (2) that the question is now moot.

1. THE COURT OF APPEALS' DECISION IS NOT CORRECT

(a). Respondent argues that if A.K. Guam had operated as a branch of A.K. California, rather than as a subsidiary corporation, it would have been liable only for one tax at the 50 percent rate (Br. Opp., pp. 4–5). In general, when corporations elect to do business through subsidiaries, they are subjected to two taxes—one on the subsidiary's earnings and one on the repatriation of the earnings. On the other hand, where a corporation does business through a branch, it is subjected to only one tax. For example, where a foreign corporation establishes a United States branch,

257-564—67

the earnings are subject to only one tax at the 50 percent rate (1954 Code § 882); if it establishes a United States subsidiary, the earnings are subject to two taxes which usually aggregate approximately 65 percent. 1954 Code § 11 (50% tax on U.S. subsidiary's earnings) and § 881 (30% tax on dividends paid to foreign parent).

In electing to do business in Guam through a subsidiary corporation, rather than a branch, A.K. California's management presumably weighed the various disadvantages, including tax, against the advantages of its choice, such as limited liability, freedom of the parent from regulation by Guam, and transferability of the equity interest in the subsidiary. Having elected the corporate form, it cannot now claim a right to be taxed as if it had chosen a branch operation. See *National Carbide Corp.* v. *Commissioner,* 336 U.S. 422, 438–439; *Moline Properties, Inc.* v. *Commissioner,* 319 U.S. 436.

(b). Respondent also argues that § 31(e) of the Organic Act of Guam, which authorizes "changes in nomenclature and other language [of the Internal Revenue Code] * * * necessary to effect the intent of this section," required the courts to reduce the tax rates, just as was done in several instances by treaty between the United States and certain foreign countries (Br. Opp. pp. 5–6). However, § 31(e) was not intended to allow the courts to rewrite the Code and to insert concepts of "equity" into the Guam tax law on a case-by-case basis. It is for Congress to determine if the imposition of both a tax of 50 percent on the corporate earnings of a Guam corporation and a tax of 30 percent on the after-tax earnings when they

are paid to its United States parent as a dividend is inequitable and, if it so determines, to make appropriate changes in the law.

The fact that the United States has entered into bilateral treaties which reduce the withholding tax below 30 percent in some instances (Pet. 10, fn. 14) is no authorization for the courts to achieve a similar result here. By making a treaty the President can, with the advice and consent of the Senate, reduce the 30 percent tax rate stated in Code § 881. *Cf.* 1954 Code §§ 894, 7852(d). While the United States cannot enter into a treaty with one of its possessions, Congress can, of course, at any time, amend the Organic Act of Guam to reduce the 30 percent withholding tax if it so chooses. In the absence of Congressional action, § 31(e) of the Organic Act does not authorize the courts to modify the basic scheme of the Code or to amend the rates.[1]

(c) Finally, respondent argues that Congress must have intended Guam to collect less than a combined tax of 65 percent in order "to encourage American business enterprise in Guam" (Br. Opp., pp. 7–8). The field of economic development of possessions, as connected with taxation, is a stringently regulated area. Congress has enacted a number of Code provisions granting tax benefits for investing in possessions, but none of them applies in the instant case.[2] Congress has also authorized and some United States possessions have adopted programs granting tax exemptions or sub-

[1] See *Government of Guam* v. *Koster*, 362 F. 2d 248 (C.A. 9).

[2] 1954 Code, §§ 48(a)(2)(B)(vii), 931, 955(c)(3); Executive Order No. 11, 071, 27 F.R. 12875 (1962).

sidies to certain industries in limited circumstances.[3] During the tax years here in question Guam had no such program. Respondent's argument is, in effect, that Congress must have intended the courts to reduce the Guam tax rates. However, the legislative history to which respondent refers (Br. Opp., pp. 7–8) reflects no Congressional intent that taxpayers such as A.K. California should receive a tax reduction when they do business in Guam through a subsidiary corporation. On the contrary, it reflects an intention that Guam should support itself from its own resources, including, under § 881, dividends paid to foreign corporate shareholders who do business in Guam through a subsidiary.

2. THE CONTROVERSY IS NOT MOOT

The judgment of the court of appeals was entered on September 30, 1966 (Pet. 25). Since no stay was obtained, the court of appeals mandate was issued 30 days thereafter (Rule 26, Rules of the Court of Appeals for the Ninth Circuit), and on December 21, 1966, the district court entered judgment for respondent ordering a refund with costs and interest. On December 28, 1966, Harold W. Burnett, Attorney General of Guam, transmitted to the Commissioner of Revenue and Taxation of Guam a copy of the Ninth Circuit's mandate and the district court's judgment and requested that a refund check be prepared (App.

[3] As to the Virgin Islands, see 33 Virgin Islands Code Ann., §§ 4041, 4,061, 4071 (1966 Cum. Pocket Supp.); 26 U.S.C. § 934; H. Rep. No. 1131, 86th Cong., 1st Sess. 3–6 (1960–2 Cum. Bull. 811, 812–815). As to the Commonwealth of Puerto Rico's much broader program, see 13 Laws of Puerto Rico Ann., §§ 252, 252a, 252b (1966 Cum. Pocket Supp.); Revenue Act of 1926, c. 27, 44 Stat. 9, § 261, as amended (48 U.S.C., § 845); Act of March 4, 1927, c. 503, 44 Stat. 1418, § 1, as amended (48 U.S.C., § 741).

infra, p. 9). On January 20, 1967, such a check was issued (App. *infra,* pp. 9–10).

When, on December 28, the Attorney General of Guam directed that a refund check be issued, he knew (having received notice the day before, December 27) that the Supreme Court had, only six days earlier, extended the time within which a petition for a writ of certiorari could be filed to February 27, 1967, and that the question whether a petition should be filed was under active consideration. However, he directed the refund "in response to mandate of the Ninth Circuit, and with no intention of settling the matter" (App. *infra,* p. 12).

In fact, respondent does not claim to have been misled by the refund. In a letter written to the Solicitor General shortly after the refund was made, counsel for respondent stated (App. *infra,* p. 10):

> We assume that the payment of the amount in controversy disposes of the case and that there will be no further proceedings. However, so far as we know neither the taxpayer nor its counsel has ever received any formal advice that a writ of certiorari would not be requested and, since the time within which to file does not expire until nearly a month from now, we would appreciate your confirming that our understanding is correct.[4]

And a recent exchange of correspondence between the Attorney General of Guam and counsel for respondent, which was designed to confirm previous oral dis-

[4] The Department of Justice replied by telephone that there was a good possibility that a petition for certiorari would be filed and that the government did not consider that the case had been mooted by the refund.

cussions between them, makes it clear that the refund was made in response to the mandate of the Ninth Circuit and with no intention of settling the case (App. *infra*, pp. 10–12).

Under these circumstances, the refund did not render the case moot. This Court set out the governing principles in *Dakota County* v. *Glidden*, 113 U.S. 222, where the plaintiff sued on certain bonds and recovered judgment. The county brought a writ of error, but then settled with the plaintiff by giving him new bonds, and the old bonds on which the suit was brought were surrendered and destroyed. In sustaining a motion to dismiss, this Court reasoned (pp. 224–225):

> *There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money.* And a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a writ of restitution. *In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal.* And so if, in the present case, the county had paid the judgment in money, or had levied a tax to raise the money, or had in any other way satisfied that judgment without changing the rights of the parties in any other

respect, its right to prosecute this writ of error would have remained unaffected.

But what was done was a very different thing from that.

A new agreement, on sufficient consideration, was made, by which the judgment itself, the coupons on which it was recovered, and the bonds of which these coupons were a part, were all surrendered and destroyed, and other bonds and other coupons were accepted in their place, payable at a more distant date and with a lower rate of interest, with the effect of extinguishing the judgment now sought to be reversed, so that the plaintiff in that judgment could not issue execution on it, though there is no supersedeas bond, to secure its payment. [Emphasis added.]

See also *Cahill* v. *New York, N.H. & H.R. Co.,* 351 U.S. 183, 184; *United States* v. *Hougham,* 364 U.S. 310, 312–313, where the Court reasoned that when the government sought certiorari in an effort to increase its judgment against the respondent, the government did not moot the case by accepting payment of the judgment, since the parties must have understood "that the payment was without prejudice to the rights of either party as those rights might come to be established by subsequent judicial decree." And see *Woodson* v. *Chamberlain,* 317 F. 2d 245, 246, where the Fourth Circuit noted that "The usual rule in the federal courts is that payment of a judgment does not foreclose an appeal. Unless there is some contemporaneous agreement not to appeal, implicit in a compromise of the claim after judgment, and so long as,

upon reversal, restitution can be enforced, payment of the judgment does not make the controversy moot."

In view of these authorities, payment of the judgment in this case did not moot the controversy.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
RICHARD C. PUGH,
Acting Assistant Attorney General.
JACK S. LEVIN,
Assistant to the Solicitor General.
HAROLD C. WILKENFELD,
J. EDWARD SHILLINGBURG,
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FRANK J. BARRY,
Solicitor,
EDWARD WEINBERG,
Deputy Solicitor,
Department of the Interior.
HAROLD W. BURNETT,
Attorney General, Government of Guam.

APRIL 1967.

APPENDIX

MEMORANDUM

GOVERNMENT OF GUAM,
Agana, December 28, 1966.

To: Commissioner of Revenue and Taxation.
From: Attorney General.
Subject: Atkins Kroll (Guam) Ltd., Civil Case 56-64.

Transmitted herewith is a copy of the mandate in the above entitled case and a copy of the judgment entered in favor of taxpayer December 21, 1966.

Kindly prepare the check for refund, interest and costs in favor of Barrett, Ferenz & Trapp and taxpayer.

HAROLD W. BURNETT.

Attachments

[Letterhead of McCutchen, Doyle, Brown, Trautman & Enersen]

JANUARY 30, 1967.

Air mail

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530.
(Attention Mildred E. Fanebust).

Government of Guam v. *Atkins, Kroll (Guam), Ltd.*, Supreme Court of the United States.

DEAR SIR: As you have previously advised us, the Supreme Court by order dated December 22, 1966, has extended to February 27, 1967, the time for filing a petition for a writ of certiorari in the above matter.

We are now informed that Atkins, Kroll (Guam),

Ltd. has received from the Government of Guam a check dated January 20, 1967, in payment of the entire amount in controversy in this case, consisting of a refund of tax in the amount of $7,500 and interest through January 20, 1967, in the amount of $2,610. Concurrently the Government of Guam has issued two other checks, one in the amount of $129.57 payable to Atkins, Kroll (Guam), Ltd. and the other in the amount of $38 payable to counsel for Atkins, Kroll (Guam), Ltd., in payment of court costs.

We assume that the payment of the amount in controversy disposes of the case and that there will be no further proceedings. However, so far as we know neither the taxpayer nor its counsel has ever received any formal advice that a writ of certiorari would not be requested and, since the time within which to file does not expire until nearly a month from now, we would appreciate your confirming that our understanding is correct.

Very truly yours,

McCUTCHEN, DOYLE, BROWN,
TRAUTMAN & ENERSEN,
By JOHN B. LOWRY.

[Letterhead of Barrett, Ferenz & Trapp]

MARCH 8, 1967.

HAROLD W. BURNETT, Esquire,
Attorney General of Guam,
Government of Guam,
Agana, Guam 96910.

Re: *Atkins, Kroll* v. *Government of Guam,* United States Court of Appeals for the Ninth Circuit, No. 19,915

DEAR HARRY: I returned to Oakland on March 7, 1967, and learned that the Solicitor General's office had

filed a petition for writ of certiorari in the above matter on February 27th. I presume that you have received a copy of the petition.

On page 14, footnote 16, the petition states that the payment made in January, 1967, by the Treasurer of Guam to the taxpayer was erroneously made under the belief that the time for filing a petition for certiorari had expired. As you will recall, I called on you at your office in Guam on or about February 15, 1967. I do not have independent recollection of the exact day but it was the last day that the airport concession bids could be received by the Director of Commerce. In any event, it was before February 23, 1967, which was the date I left Guam.

While I was in your office we discussed the question of the payment and I inquired specifically as to why payment was made in view of the fact that the time within which to petition for certiorari had not expired. It is my recollection that you acknowledged that payment was made fully aware of the fact that the Solicitor General was still considering whether to petition and with knowledge of the fact that the time within which to petition had not expired.

John B. Lowry, Esquire, of McCutchen, Doyle, Brown, Trautman & Enersen, and ourselves are preparing a reply to the petition which is due on March 30, 1967. We intend to meet the contentions of the Solicitor General with respect to the circumstances of payment as I have outlined above. I would appreciate it if you would advise me if my recollection of our conversation differs in any respect with your recollection.

We expect to be sending our brief to the printer no later than March 22, 1967. Unless I hear to the

contrary by that date, I will assume that your recollection is the same as mine.

Kindest personal regards.

Very truly yours,

BARRET, FERENZ & TRAPP,
/s/ WALTER S. FERENZ.

[Letterhead of the Attorney General of Guam]

MARCH 16, 1967.

WALTER S. FERENZ, ESQUIRE,
Barrett, Ferenz & Trapp,
Penthouse-1924 Broadway,
Oakland, California 94612.

DEAR WALT: Prior to receiving your letter of March 8, 1967, I noted, and advised the Department of Justice of the error in footnote 16, page 14, of our petition for certiorari in the Atkins, Kroll matter. Correction is being made, and I assume you will have received copies by the time this reaches you.

Your recollection of our conversation is essentially the same as mine. I was fully aware that the petition was still under consideration and that the time had not expired. Payment was made in response to mandate of the Ninth Circuit, and with no intention of settling the matter.

Sincerely yours,

HAROLD W. BURNETT,
Attorney General.

cc: Jack S. Levin,
Assistant to the Solicitor General.
Mrs. Ruth Van Cleve,
Director, Office of Territories.

U.S. GOVERNMENT PRINTING OFFICE: 1967